SUPREME COURT OF THE
STATE OF WASHINGTON
Case No. 94677-9

CERTIFICATION FROM UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA

IN

OHIO SECURITY COMPANY,

Plaintiff,

v.

AXIS INSURANCE COMPANY

Defendant.

OPENING BRIEF OF DEFENDANT AXIS INSURANCE COMPANY

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I. INTRODUCTION

This Court frequently accepts review of challenging cases that require it to answer difficult questions and resolve complex issues. This is not one of those cases.

Washington's statutory service scheme is clear and unambiguous. RCW 4.28.080 identifies the various methods to accomplish personal service. Subsection 7(a) of that statute governs authorized foreign insurers and it mandates compliance with a substitute service statute, RCW 48.05.200. This substitute service statute requires all authorized foreign insurers to appoint the Washington Insurance Commissioner as their attorney to accept service of process, and it also states explicitly that service upon the insurer "***can only be had by service upon the commissioner*** . . . ."[1] To accomplish service on the Commissioner, RCW 48.05.200 requires a plaintiff to follow the method of service set forth in RCW 48.02.200. According to the Legislature, this is how you serve an authorized foreign insurer in Washington.

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[1] RCW 48.05.200(1) (emphasis added).

The United States District Court for the Western District of Washington (the "District Court") has certified a question to this Court, asking whether the statutory scheme outlined above is the exclusive method for serving an authorized foreign insurer in the state of Washington. It does so because Ohio Security Insurance Company—an authorized foreign insurer—failed to comply with these statutes. Rather than serving the Commissioner, Ohio Security tried to serve AXIS Insurance Company at an AXIS office in Chicago, Illinois. Thus, it undeniably failed to comply with RCW 48.05.200. It now argues, however, that the above-described statutory service scheme conflicts with Washington's long-arm statute, RCW 4.28.185.

But this is incorrect. To comply with the long-arm statute, a plaintiff must file an affidavit stating that the defendant cannot be served within the state of Washington.[2] By law, an authorized foreign insurer ***must*** appoint the Commissioner to accept service.[3] And, therefore, service upon an authorized foreign insurer can ***always*** be accomplished within the state. Because the long-arm statute permits

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[2] RCW 4.28.185(4).

[3] RCW 48.05.200(1).

extra-territorial service only in situations where RCW 48.05.200 does not apply, the alleged statutory conflict urged by Ohio Security does not exist.

Ohio Security and AXIS are both authorized foreign insurers. Accordingly, there is no excuse for either of them to ignore Washington's statutory service requirements. This Court should not save Ohio Security from its own litigation mistakes. The answer to the District Court's question is "yes."

II. ISSUE CERTIFIED TO THE WASHINGTON SUPREME COURT

Do RCW 4.28.080(7)(a), RCW 48.02.200, and RCW 48.05.200 establish service through the Washington State Insurance Commissioner as a uniform and exclusive means of service for authorized foreign or alien insurers in Washington State?

III. STATEMENT OF THE CASE

This case concerns an insurance coverage dispute between two authorized foreign insurers, Ohio Security and AXIS. Ohio Security's insured, Grosso Enterprises Tacoma, LLC, leased a building at 9625 32nd Avenue South, in Lakewood, Washington (the "Lakewood

Building").[4] The lessee was AXIS's insured, Reddy Ice Holdings, a company that manufactures and packages ice.[5]

On January 20, 2012, a snowstorm, followed by freezing rain, caused ice to form on top of the roof of the Lakewood Building.[6] Ice and snow plugged the roof's drains, which, in turn, overloaded the roof with snow and frozen rainwater.[7] The roof was unable to withstand the weight of the snow and ice, and collapsed.[8]

Reddy Ice tendered a claim to its insurer, AXIS, and Grosso Enterprises tendered a claim to its insurer, Ohio Security.[9] AXIS adjusted Reddy Ice's insurance claim and paid a total of $1,332,799.32 for business personal property, debris removal, and extra expense

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[4] Dkt No. 21-1 (Lease between Grosso Enterprises and Reddy Ice, dated May 16, 2011).

[5] *Id.*

[6] Dkt No. 21, at pp. 1-2 (Declaration of Vicki Brooks in Support of Motion for Summary Judgment of AXIS Insurance Company ("Brooks Decl.") at ¶ 3).

[7] *Id.*

[8] *Id.*

[9] *Id.*

coverage.[10] Ohio Security did not reimburse AXIS for any of its payments to Reddy Ice. Approximately one year after the snowstorm, AXIS agreed to add Grosso Enterprises as an additional insured onto the AXIS Policy issued to Reddy Ice.[11]

Ohio Security made payments totaling $1,794,087 to Grosso Enterprises for physical damage caused by the snowstorm to the Lakewood Building itself.[12] It later demanded that AXIS pay one half of this amount.[13] But because the AXIS Policy did not cover Grosso Enterprises' insurable interest in the property (e.g., the roof and other structural elements) at the time of the loss, AXIS declined to reimburse Ohio Security.[14]

Approximately two years after the loss, Ohio Security sued AXIS in Pierce County Superior Court.[15] Ohio Security, however, did

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[10] Dkt No. 21-3 (AXIS's Final Statement of Loss).

[11] Dkt No. 21, at p. 2 (Brooks Decl. at ¶ 6).

[12] Dkt No. 20-2 (Screenshots from Ohio Security's Claim Summary).

[13] Dkt No. 21, at p. 2 (Brooks Decl. at ¶ 4).

[14] *See id.*

[15] Dkt No. 1-2 (Complaint filed Ohio Security). Grosso Enterprises and Reddy Ice were originally parties to this lawsuit but were subsequently dismissed.

not serve the Commissioner as required by RCW 48.05.200. Instead, it hired a messenger to deliver a copy of the summons and complaint to an AXIS office in Chicago.[16] A senior underwriting assistant working in AXIS's Chicago office signed for the delivery.[17] But she was not authorized to accept service on AXIS's behalf.[18]

Because Ohio Security failed to property serve AXIS, AXIS filed a motion to dismiss.[19] In response, Ohio Security served the Commissioner for the first time.[20] AXIS then promptly removed the lawsuit to the District Court.[21] Ohio Security did not move to remand

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[16] Dkt No. 1-3, at pp. 64-65 (Ohio Security's First Certificate of Service).

[17] *Id.*

[18] Dkt No. 1-3, at pp. 169-70 (Declaration of Edith Green in Support of Defendant AXIS Insurance Company's Motion to Dismiss ("Green Decl.") at ¶ 2-3).

[19] Dkt No. 1-3, at pp. 51-59 (Defendant AXIS Insurance Company's Motion to Dismiss).

[20] Dkt No. 1-3, at pp. 172-77 (Ohio Security's Second Certificate of Service).

[21] Dkt No. 1 (Notice of Removal).

the lawsuit or argue that removal (which must be accomplished within 30 days of service) was untimely.[22]

Ohio Security and AXIS both filed motions for summary judgment.[23] AXIS argued, in part, that Ohio Security's improper service failed to toll the applicable statute of limitations and, thus, a large portion of Ohio Security's equitable contribution claim was time barred.[24] The District Court requested supplemental briefing on this issue,[25] and then certified the following question to this Court:

> Do RCW 4.28.080(7)(a), RCW 48.02.200, and RCW 48.05.200 establish service through the Washington State Insurance Commissioner as a uniform and exclusive mans of service for authorized foreign or alien insurers in

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[22] A defendant must filed a notice of removal with 30 days of proper service. 28 U.S.C. § 1446(b).

[23] Dkt No. 19 (Motion for Summary Judgment of Defendant AXIS Insurance Co.) and Dkt No. 22 (Ohio Security's Motion for Summary Judgment).

[24] *See* Dkt No. 19 (Motion for Summary Judgment of Defendant AXIS Insurance Co.); *see also* Dkt No. 32 (Reply of Defendant AXIS Insurance Co. in Support of Motion for Summary Judgment).

[25] Dkt No. 35 (Order Granting the Parties' Stipulated Motion to Continue, Renoting and Reserving Ruling on the Parties' Cross-Motions for Summary Judgment, Requesting Supplemental Briefing, and Setting Oral Argument).

Washington State?[26]

For the reasons discussed below, this Court should answer "yes," to the District Court's question, and hold that Commissioner was the exclusive agent to accept service of legal process on AXIS's behalf.

IV. ARGUMENT

Service statutes safeguard due process by making sure that a party receives proper notice and the opportunity to be heard.[27] RCW 4.28.080 sets forth the methods selected by the Washington Legislature to effectively serve a party in the Washington courts. And subsection 7(a) of that statute, governs service upon authorized foreign insurers:

> Service made in the modes provided in this section is personal service. The summons shall be served by delivering a copy thereof, as follows:

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[26] Dkt No. 47 (Order Certifying Question to the Washington State Supreme Court).

[27] *Wichert v. Cardwell*, 117 Wn.2d 148, 151, 812 P.2d 858 (1991) ("The purpose of statutes which prescribe the methods of service of is to provide due process. 'The fundamental requisite of due process of law is the opportunity to be heard.'" (quoting *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 58 L. Ed. 1363 (1914)); *Topliff v. Chicago Ins. Co.*, 130 Wn. App. 301, 306, 122 P.3d 922 (2005) ("Service statutes are designed to ensure due process. In our context, due process requires notice and an opportunity to be heard.") (internal citation omitted); *see also Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

* * *

> If against an authorized foreign or alien insurance company, as provided in RCW 48.05.200.

Thus, RCW 4.28.080(7)(a), requires a party intending to serve legal process on an authorized foreign insurer to comply with a substitute service statute, RCW 48.05.200.[28]

RCW 48.05.200 provides as follows:

> Each authorized foreign or alien insurer must appoint the commissioner as its attorney to receive service of, and ***upon whom must be served, all legal process*** issued against it in this state upon causes of action within this state. Service upon the commissioner as attorney constitutes service upon the insurer. ***Service of legal process against the insurer can be had only by service upon the commissioner***, except actions upon contractor bonds pursuant to RCW 18.27.040, where service may be upon the department of labor and industries. [29]

Under this statute, an authorized foreign insurer ***must*** appoint the Commissioner as its attorney to accept service of legal process and, with the sole exception of actions involving contractor bonds, the Commissioner is the ***exclusive*** agent for accepting service on behalf of an authorized foreign insurer. To serve the Commissioner, a party must

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[28] RCW 4.28.080(7)(a).

[29] RCW 48.05.200(1) (emphasis added).

also comply with RCW 48.02.200, which sets out the appropriate method of service.[30]

The question certified by the District Court is whether this statutory scheme establishes the exclusive method of serving an authorized foreign insurer in the state of Washington.

A. The Washington Legislature identified the Commissioner as the only agent able to accept service on behalf of an authorized foreign insurer.

This Court enforces unambiguous statutory language as written.[31] And the plain language of the relevant service statutes is clear: an authorized foreign insurer "***must***" appoint the Commissioner as its agent to receive service, and all legal process "***must***" be served on the Commissioner.[32] If the Court adopts a fair and reasonable interpretation of RCW 48.05.200, the answer to the District Court's question is clearly "yes."

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[30] RCW 48.05.200(5) ("The service of process must be accomplished and processed in the manner prescribed under RCW 48.02.200.").

[31] *Little Mountain Estates Tenants Ass'n v. Little Mountain Estates MHC LLC*, 169 Wn.2d 265, 270, 236 P.3d 193 (2010).

[32] *See* RCW 48.05.200(1) (emphasis added).

Historically, the statutory language was more cumbersome. For more than 60 years, Washington statutes stated that an authorized foreign insurer "***shall***" appoint the Commissioner as its agent to receive services of process and that all legal process "***shall***" be served on the Commissioner.[33] But, in 2011, the Washington Legislature updated this statutory language, changing the word "shall" to "must," thereby making it unequivocally clear that the Commissioner is the exclusive agent to receive service of legal process on behalf authorized foreign insurers.[34]

Unlike the word "must," the word "shall" is notoriously troublesome when used in statutes.[35]

> Sometimes lawyers use it to impose a duty: "The defendant shall file an answer within 30 days . . . ." Other times lawyers use it to express a future action ("the lease shall terminate . . . .") or event an entitlement ("the landlord shall have the right to inspect. . . .")[.] Drafting experts have identified several additional shades of

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[33] *See*, e.g., REM. REV. STAT. § 45.05.20 (1947); RCW 48.05.200(1) (1985); *see also* LAWS OF 1947, ch. 79, § 05.20; LAWS OF 1985, ch. 264, § 3.

[34] *See* LAWS OF 2011, ch. 47, § 5.

[35] RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS 66 (4th ed. 1998) ("The biggest troublemaker is *shall*.") (emphasis in original).

meaning shall can carry.[36]

Although the term "shall" typically conveys a mandatory duty, "the word frequently bears other meanings—sometimes even masquerading as a synonym of may."[37]

> The word "shall:"
>
> > is supposed to mean 'has a duty to,' but it almost never does mean this when it's preceded by a negative word such as nothing or neither:
> >
> > * * *
> >
> > - Neither party shall assign this Agreement, directly or indirectly, without the prior written consent of the other party.
>
> Does that . . . example really mean that neither party has a duty to assign the agreement? No. It means that neither party is allowed to (that is, may) assign it.[38]

Given the ambiguities that frequently arise from using the word "shall," the United States Supreme Court has held that the term can

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[36] *Id.* (emphasis omitted); *see also* Nora Rotter Tillman & Seth Barrett Tillman, *A Fragment on* Shall *and* May, 50 AM. J. LEGAL HIST. 453, 455-56 (2010) (contrasting the Eighteenth Century use of the word "shall" with present usage); Joseph Kimble, *The Many Misuses of "Shall,"* 3 SCRIBES J. LEGAL WRITING 61, 62-63 (1992) (discussing history of the meaning of the word "shall").

[37] BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH § 35 (2001) (emphasis omitted).

[38] *Id.* (emphasis omitted).

have several different meanings.[39] And, in fact, in some contexts, the Supreme Court has even held that "shall" presumptively means "may."[40] Thus, increasingly "official drafting bodies are recognizing the problem[,]" removing the word "shall" from statutory provisions, and replacing it with clear terms like "must."[41]

This type of statutory clean-up and clarification is exactly what the Washington Legislature undertook in 2011. At the Commissioner's request, two senators sponsored a bill to modernize statutory language regulating the insurance industry:

> The Revised Code of Washington is periodically updated and clarified by the various state agencies responsible for its implementation. This clean-up process eliminates obsolete language, makes minor substantive or technical changes, and repeals outdated sections. This is the [Office of Insurance Commissioner's] clean-up bill.[42]

Accordingly, the Legislature changed the archaic and confusing term

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[39] ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 113-14 (2012) (identifying six different holdings of the Supreme Court construing the term "shall").

[40] *See Railroad Co. v. Hecht*, 95 U.S. 168, 170, 24 L. Ed. 423 (1877) ("As against the government, the word 'shall,' when used in statutes, is to be construed as 'may,' unless a contrary intention is manifest.").

[41] GARNER, *supra* note 37, at 106.

[42] *FINAL B. REP.* ON S.B. 5213, 62ND LEG. REG. SESS. (Wash. 2011).

"shall" to the word "must," declaring unmistakably that the Commissioner—and only the Commissioner—can accept service of process on behalf of an authorized foreign insurer.[43]

B. The Washington Legislature has authority to name one local official to accept service on behalf of certain classes of defendants.

Prior decisions of this Court recognize and affirm the Washington Legislature's authority to designate one official to receive service of process on behalf of certain classes of defendants. In *Nitardy v. Snohomish County*,[44] for example, a Snohomish County agency fired its employee, Susan Nitardy, and Nitardy sued the County for wrongful discharge.[45] Nitardy served the County by leaving a copy of the summons and complaint with a secretary at the County Executive's office.[46] A Washington statute, however, RCW 4.28.080(1), designated the County Auditor as the exclusive agent to accept service on the County's behalf.[47] The County therefore moved for summary

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[43] *See* LAWS OF 2011, ch. 47, § 5.

[44] 105 Wn.2d 133, 712 P.2d 296 (1986).

[45] *Id.* at 133-34.

[46] *Id.* at 134.

[47] *Id.*

judgment on grounds that Nitardy's service was improper.[48] After the trial court granted the County's motion, this Court accepted direct review.[49]

On appeal, this Court affirmed the trial court's order dismissing Nitardy's lawsuit due to improper service.[50] In doing so, this Court rejected Nitardy's argument that her "substantial compliance" with the service statute was sufficient to provide the trial court with personal jurisdiction over the County:[51]

> The Legislature has named a specific person who is to be served when the defendant is a government body. The applicable statutory clause is clear in its mandate. Service on anyone other than the Auditor is insufficient. The Legislature has acted reasonably in naming one person to be the recipient of and to have the responsibility of receiving service of process.[52]

Like the statute at issue in *Nitardy*, RCW 48.05.200 clearly specifies one person to receive and accept service on behalf of

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[48] *Id.*

[49] *Id.*

[50] *Id.* at 133.

[51] *Id.* at 134.

[52] *Id.* at 134-35 (internal citations omitted) (emphasis added).

authorized foreign insurers—the Commissioner.[53] For the same reasons that this Court affirmed the dismissal of Nitardy's claims against the County, this Court should conclude that Ohio Security's failure to serve the Commissioner was insufficient to effect service on AXIS.

C. Washington's long-arm statute does not conflict with RCW 48.05.200.

Ohio Security contends that service upon an authorized foreign insurer need not be made upon the Commissioner. According to Ohio Security, the exclusive service provisions of RCW 48.05.200 conflict with Washington's long-arm statute. In support of its position, Ohio Security relies on two decisions from the Washington Court of Appeals: *Kiblen v. Mut. of Omaha Ins. Co.*,[54] and *Powell v. Sphere Drake Ins.*[55] But neither decision provides a sound basis to ignore the plain language of RCW 48.05.200.

1. *Kiblen v. Mut. of Omaha Ins. Co.*

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[53] *See* RCW 48.05.200(1) ("Service of legal process against the insurer can be had only by service upon the commissioner").

[54] 42 Wn. App. 65, 708 P.2d 1215 (1985).

[55] 97 Wn. App. 890, 988 P.2d 12 (1999).

In *Kiblen*, the insured sued his insurer and, instead of serving the Commissioner, served the insurer at its home office in Nebraska.[56] At the time *Kiblen* was decided, RCW 48.05.200 provided:

> Each authorized foreign or alien insurer ***shall*** appoint the commissioner as its attorney to receive service, and upon whom ***shall*** be served, all legal process. . . .[57]

Based on this statutory language, the trial court held that the insured's service was improper.[58]

On appeal, the Washington Court of Appeals reversed.[59] According to the court, the Legislature originally promulgated RCW 48.05.200, which seems to require service on the Commissioner.[60] But the Legislature later enacted two other statutes—RCW 4.28.185 (the long-arm statute) and RCW 4.28.180 (the extra-territorial service statute)—which the court believed permitted service on agents other than the Commissioner outside of Washington.[61] To resolve this

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[56] *Kiblen*, 42 Wn. App. at 66.

[57] RCW 48.05.200(1) (1985) (emphasis added).

[58] *Kiblen*, 42 Wn. App. at 66.

[59] *Id.* at 68.

[60] *Id.* at 67.

[61] *Id.*

apparent conflict, the court determined that the provisions in RCW 48.05.200, which, at first glance, appear mandatory (e.g., provisions stating the Commissioner "shall" be served with all legal process) actually express a mere "preference for service" on the Commissioner.[62] Relying *Kiblen*'s reasoning, Ohio Security now contends that RCW 48.05.200 does not require service on the Commissioner, but, instead, expresses only a mere "preference" for service upon him.

a. *Kiblen* conflicts with this Court's subsequent decisions.

Ohio Security is wrong. To begin with, *Kiblen*'s holding conflicts with this Court's more recent decisions. As discussed above, in *Nitardy*, which was decided the year after *Kiblen*, this Court addressed a nearly-identical issue. Namely, is service effective if the plaintiff serves someone other than the single official designated by the Legislature to accept service?[63] This Court responded to the question

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[62] *Id.* at 67-68.

[63] *Nitardy*, 105 Wn.2d at 133 ("The main issue presented in this case is whether service of process on a secretary to the County Executive is sufficient service on a County defendant when the applicable statute requires service on the County Auditor.").

with an unequivocal "no,"—service on anyone other than the exclusive agent identified by the Legislature is ineffective.[64] To the extent *Kiblen* conflicts with *Nitardy*, it has been overruled.

Likewise, *Kiblen* failed to require the plaintiff to strictly comply with the substitute service provisions in RCW 48.05.200. This, too, is wrong. As this Court previously explained:

> One interpretive distinction this court makes in construing service of process statutes and rules is between strict compliance and substantial compliance. ***Constructive or substituted service statutes require strict procedural compliance.***[65]

And, therefore, "[a]s a substitute service statute, RCW 48.05.200, requires strict compliance."[66] To the extent *Kiblen* held that RCW 48.05.200 does not require strict compliance, it is no longer good law.

b. *Kiblen* created a false conflict by ignoring key provisions of the long-arm statute.

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[64] *Id.* at 134-35 ("The applicable statutory clause is clear in its mandate. Service upon anyone other than the Auditor is insufficient.").

[65] *Martin v. Triol*, 121 Wn.2d 135, 144, 847 P.2d 471 (1993) (emphasis added).

[66] *Topliff*, 130 Wn. App. at 306.

In any event, *Kiblen* failed to properly interpret the applicable statutes at issue. The long-arm statute and RCW 48.05.200 do ***not*** conflict.

Although Washington's long-arm statute permits extra-territorial service, it also requires the plaintiff to file an affidavit stating that the defendant cannot be served in Washington:

> Personal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.[67]

Accordingly, if a defendant can be served in Washington, the plaintiff will be unable to file the required affidavit. And, thus, if service can be made within Washington, the plaintiff will be unable to accomplish service under the long-arm statute.

But an authorized insurer can ***always*** be served in Washington. Under RCW 48.05.200, an authorized foreign insurer must appoint the Commissioner as its agent to accept service of process.[68] Because a plaintiff can always serve the Commissioner in Washington, the

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[67] RCW 4.28.185(4).

[68] RCW 48.05.200(1) ("Each authorized foreign or alien insurer must appoint the commissioner as its attorney to receive service of, and upon whom must be served, all legal process . . . .").

plaintiff can ***never*** file an affidavit stating that "service cannot be made within the state." A plaintiff, therefore, cannot serve an authorized foreign insurer under the long-arm statute. Applying the plain language of both RCW 4.28.185(4) and RCW 48.05.200(1), effective service against an authorized foreign insurer can be had only by service upon the Commissioner.

c. *Kiblen* relied on erroneous historical analysis.

In *Kiblen*, the court not only failed to properly interpret the long-arm statute and RCW 48.05.200, it also misunderstood the long-arm statute's history and fundamental purpose. This confusion arose from the court's dubious historical analysis. According to the court, the Legislature adopted Washington's extra-territorial service and long-arm statutes ***after*** it enacted the statutory service requirements applicable to insurers.[69] But this is only half true.

Statutory provisions governing both extra-territorial service and service upon insurers were first adopted by the Legislature shortly after Washington became a state.[70] The Legislature subsequently amended

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[69] *See Kiblen*, 42 Wn. App. at 67 ("RCW 4.28.080(7) existed prior to the enactment of RCW 4.28.180 and .185").

[70] *See* LAWS OF 1891, ch. 58, § 3 (stating that to serve an insurance company, the plaintiff must serve an "agent authorized by such

these provisions,[71] and, in 1951, it incorporated them into the newly-implemented Revised Code of Washington.[72] Six-years later, the Legislature adopted the contemporary statutory scheme, according to which RCW 4.28.080 mandates that service upon authorized foreign insurers must be made in compliance with RCW 48.05.200.[73]

In 1959, Washington's extra-territorial service provisions were again amended.[74] The United States Supreme Court had held fourteen-years earlier that a court could exercise personal jurisdiction over

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company or corporation to solicit insurance within this state"); LAWS OF 1893, ch. 127, § 11 (providing for extra-territorial service on defendants).

[71] *See, e.g.*, LAWS OF 1895, ch. 127, § 11 (amending extra-territorial service provisions); LAWS OF 1947, ch. 79, § 05.20 (requiring appointment of Commissioner as exclusive agent to receive service of process for foreign insurers).

[72] *See* LAWS OF 1951, ch. 16, §§ 1-3); *see also* Kelly Kunsch, *Statutory Compilations of Washington*, 12 U. PUGET SOUND L. REV. 285, 302-303 (1989) (discussing adoption of Revised Code of Washington in 1951).

[73] *See* LAWS OF 1957, ch. 202, § 1 (stating that to serve a foreign or alien insurer, a plaintiff must comply with RCW 48.05.200 and RCW 48.05.210).

[74] *See* LAWS OF 1959, ch. 131, § 1 (amending extra-territorial service requirements).

defendants with sufficient "minimum contacts."[75] In response, states across the country began giving broader scope to statutes governing personal jurisdiction over nonresidents, or "long-arm" statutes.[76] Inspired by this growing trend, the Washington Legislature adopted this state's first long-arm statute, patterning it after a similar statute that had already been implemented in Illinois.[77]

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[75] *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945) ("due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contact with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'") (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1941)). Prior to *International Shoe*, the Supreme Court upheld a statute extending jurisdiction to nonresident motorists in *Hess v. Pawloski*, 274 U.S. 352, 356-57, 47 S. Ct. 632, 71 L. Ed. 1091 (1927). As discussed below, these decisions emboldened state legislatures to expand the reach of statutes governing personal jurisdiction over nonresidents.

[76] *See* 4 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & ADAM STEINMAN, FEDERAL PRACTICE & PROCEDURE § 1068 (4th ed. 2015) (discussing the history of long-arm jurisdiction); *see also* Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 492 (2004) (same).

[77] *See* LAWS OF 1959, ch. 131, § 2 (enacting long-arm statute); *see also* Philip A. Trautman, *Long-Arm and Quasi in Rem Jurisdiction in Washington*, 51 WASH. L. REV. 1, 3 (1975) ("Washington in 1959 was one of the first to adopt a comprehensive long-arm statute, patterned after an earlier Illinois statute which had been enacted in 1955.") (footnotes omitted).

The court in *Kiblen*, fundamentally misunderstood the historical development of Washington's statutory service provisions. Contrary to *Kiblen*, the Legislature did not enact its extra-territorial service provisions after it made the Commissioner the sole agent capable of accepting service on behalf of authorized foreign insurers. And, in fact, extra-territorial service provisions were adopted by the Legislature long before it required authorized foreign insurers to name the Commissioner as their exclusive agent to accept service.

Moreover, the extra-territorial service amendments and the adoption of Washington's first long-arm statute were ***not*** intended to change the Commissioner's role as the exclusive agent to accept legal process on behalf of foreign insurers. Rather, these measures were designed to ensure that Washington courts could exercise personal jurisdiction to the full limits of constitutional due process.[78] The statutory changes of 1959 were intended to expand personal jurisdiction, not to abrogate each of the individual service requirements set forth in RCW 4.28.080, or the exclusive appointment of the

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[78] *See, e.g., Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 771, 783 P.2d 78 (1989) ("We conclude that Washington's long-arm statute extends jurisdiction to the limit of federal due process.").

Commissioner as the agent to accept service for authorized foreign insurers in RCW 48.05.200.

d. Even if the statutes appeared to conflict, *Kiblen* employed a flawed method of statutory interpretation.

Even if the court in *Kiblen* accurately identified a conflict between the long-arm statute and RCW 48.05.200, and correctly grasped the long-arm statute's history and purpose, its decision still rested on deficient statutory interpretation.

The *Kiblen* court claimed to identify a conflict between RCW 48.05.200 and the long-arm statute regarding service on the Commissioner: RCW 48.05.200 mandated that a plaintiff "shall" serve the Commissioner to accomplish service on an authorized foreign insurer, but the long-arm statute (purportedly) permitted extra-territorial service on agents other than the Commissioner. To reconcile these allegedly conflicting statutes, the court in *Kiblen* gave effect solely to the provisions of the long-arm statute, and held that the mandatory provisions of RCW 48.05.200 expressed a mere "preference" for service on the Commissioner.[79]

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[79] *Kiblen*, 42 Wn. App. at 67-68.

There is no authority cited by *Kiblen* to support its approach to statutory construction and *Kiblen*'s interpretative method violates at least three principals promulgated by this Court. First, this Court requires apparently inconsistent statutes to be harmonized, if at all possible, so that each statute may be given effect.[80] To simply disregard the service requirements in RCW 48.05.200 due to an apparent conflict with RCW 4.28.185, violates this Court's approved canons of construction.

Again, these statutes are not inconsistent and can easily be reconciled. The long-arm statute permits service on insurers only if the insurer cannot be served in Washington. RCW 48.05.200 requires every authorized foreign insurer to appoint the Commissioner as its exclusive agent to receive service in the state of Washington. Because an authorized foreign insurer can (and must) always be served in the state of Washington, the long-arm statute never applies. By failing to harmonize the two statutes, *Kiblen* failed to interpret them properly.

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[80] *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 690, 743 P.2d 793 (1987) ("we have often recognized our responsibility to harmonize statutes if at all possible, so that each may be given effect"); *In re Mayner*, 107 Wn.2d 512, 522, 730 P.2d 1321 (1986) ("Where two statutes are in apparent conflict, we will if possible reconcile them to the end that each may be given effect.").

Second, even if RCW 48.05.200 and the long-arm statute actually conflict, a court should give effect to the more specific over the more general statute.[81] In this case, the long-arm statute is obviously more general because its provisions address a large variety of potential actors and causes of action (e.g., any individual who transacts business in Washington, who commits a tort in Washington, or who owns property in Washington) not just actions against authorized foreign insurers.[82] In contrast, RCW 48.05.200, is extremely narrow, applying only to authorized foreign insurers, and the commencement of actions brought against them.[83] Therefore, even if the two statutes conflicted, a

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[81] *See, e.g., Sim v. Wash. State Parks & Recreation Comm'n*, 90 Wn.2d 378, 382, 583 P.2d 1193 (1978) ("Since the two statutory provisions seemingly conflict . . . the special statute should be given controlling effect"); *Meade v. French*, 4 Wash. 11, 14, 29 P. 833 (1892) ("There is, however, another fundamental rule of construction which is embodied in the maxim, *generalia specialibus non derogant*, the application of which, it seems, can be consistently held to apply to this case."); *see also Perez-Guzman v. Lynch*, 835 F.2d 1066, 1075 (9th Cir. 2016) ("[*generalia specialibus non derogant*] provides that a 'narrow, precise and specific' statutory provision is not overridden by another provision 'covering a more generalized spectrum' of issues.") (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153-54, 96 S.Ct. 500, 184 L. Ed. 2d 328 (2012)).

[82] RCW 4.28.185.

[83] RCW 48.05.200.

court should give effect to the more specific provisions of RCW 48.05.200. The court in *Kiblen* simply ignored this principle.

Third, a court may not adopt an interpretation of a statute that eliminates the meaning of statutory language or renders it superfluous.[84] In 1985, a few months before *Kiblen* was decided, the Legislature amended RCW 48.05.200 and created an exception for actions involving contractor bonds.[85] Following the 1985 amendments, RCW 48.05.200 provided that: "Service of legal process against the insurer can be had only by service upon the commissioner, ***except*** actions upon contractor bonds. . . ."[86] Thus, if an action against an authorized foreign insurer involves a contractor bond, the Commissioner is ***not*** the exclusive agent to accept service.

But if individuals other than the Commissioner could already accept service on behalf of authorized foreign insurers, then the

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[84] *See Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous."); *see also City of Seattle v. State Dep't of Labor & Indus.*, 136 Wn.2d 693, 698, 965 P.2d 619 (1998) (approving of interpretative principals identified in *Whatcom County*).

[85] *See* LAWS OF 1985, ch. 264, § 3.

[86] *Id.* (emphasis added); RCW 48.05.200(1).

Legislature's exception for actions involving contractor bonds makes no sense. The *Kiblen* court's interpretation of the statute renders the contractor-bond exception meaningless. Because the court in *Kiblen* failed to apply all three of these well-established cannons of construction—or any other recognized principles of interpretation—its reasoning is flawed and unpersuasive.

e. *Kiblen* is abrogated by the 2011 amendments to RCW 48.05.200.

Even if *Kiblen* was correctly decided at the time, it has been abrogated by later changes to the relevant service statutes. As discussed above, *Kiblen* reasoned that a court should always give priority to later statutory enactments. The court prioritized the provisions of the long-arm statute, RCW 4.28.185, because it was adopted after (what were at the time) the most recent amendments to the service requirements in RCW 4.28.080(7) and RCW 48.05.200.[87]

If this Court were to apply this same principle, however, it should still rule in favor of AXIS. Subsequent amendments by the Legislature actually clarify that the Commissioner is the exclusive

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[87] *Kiblen*, 42 Wn. App. at 67.

agent to receive service of process on behalf of authorized foreign insurers.

In 2011, the Legislature clarified RCW 48.05.200 by jettisoning the notoriously troublesome word "shall" and changing it to "must." By doing so, the Legislature clearly endorsed the view that to serve an authorized foreign insurer, service of process ***must*** be served upon the Commissioner.[88]

Thus, even if this Court adopts *Kiblen*'s novel interpretive principle, it should hold that the Legislature's subsequent enactments overrule *Kiblen* to the extent it denied the Commissioner's exclusive authority to accept service on behalf of authorized foreign insurers.

2. *Powell v. Sphere Drake Ins. P.L.C.*

Ohio Security also relies on the Washington Court of Appeals decision in *Powell*.[89] Again, however, this reliance is misplaced.

In that case, a seaman named David Powell suffered injuries while working aboard a vessel owned by two corporate owners.[90]

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[88] *See* LAWS OF 2011, ch. 47, § 5.

[89] 97 Wn. App. 890.

[90] *Id.* at 892

Powell sued the two owners.[91] But during the course of the litigation, the two owners became insolvent and dissolved.[92] Notwithstanding this dissolution, the owners' liability insurer, Sphere Drake, continued to defend them in the underlying action.[93] Powell ultimately obtained a judgment against one of the owners, but because of the prior dissolution there were no assets to satisfy the judgment.[94]

Powell then sued Sphere Drake, alleging violations of both state and federal statutes.[95] To commence the lawsuit, Powell served a third-party adjuster, LaMorte Burns & Co., and not the Commissioner.[96] Sphere Drake moved to dismiss, in part, due to Powell's insufficient service.[97]

On appeal, the Washington Court of Appeals held that there was insufficient evidence to dismiss Powell's lawsuit based on improper

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[91] *Id.*

[92] *Id.*

[93] *Id.* at 892-93.

[94] *Id.* at 893.

[95] *Id.*

[96] *Id.* at 899.

[97] *Id.* at 893.

service.[98] Sphere Drake contended that Powell was required to serve the Commissioner.[99] But the court disagreed, holding that service upon LaMorte could have been sufficient, if Sphere Drake had designated LaMorte as its domestic agent to receive service of process.[100] Ohio Security relies on *Powell* to argue that an agent other than the Commissioner can accept service on behalf of an authorized foreign insurer, and, therefore, the services provisions in RCW 48.05.200 should not be treated as mandatory.

But *Powell* is not controlling because it concerned a different statute. Unlike AXIS, the insurer in *Powell*, was an ***unauthorized*** foreign insurer.[101] Accordingly, the applicable service statute was

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[98] *Id.* at 899.

[99] *Id.*

[100] *See id.* at 900 ("Nor is there enough in the record to determine whether service on a LaMorte Burns agent in Washington, rather than Connecticut, is sufficient here.").

[101] At the time *Powell* was decided, RCW 4.28.080(7) did not expressly distinguish between authorized an unauthorized foreign insurers. *See* RCW 4.28.080(7) (1999) ("If against a foreign or alien insurance company, as provided in chapter 48.05 RCW."). In 2011, the Legislature amended the statute so that it now specifies the appropriate service requirements for several different types of insurers. *See* LAWS OF 2011, ch. 47, § 1.

RCW 48.05.215 (which governs service on unauthorized foreign insurers), not RCW 48.05.200 (which governs service on authorized foreign insurers). At the time *Powell* was decided, RCW 48.05.215 provided:

> In any such action, suit or proceeding instituted by or on behalf of an insured or beneficiary, service of legal process against such unauthorized foreign or alien insurer ***may be made*** by service of duplicate copies of legal process on the commissioner by a person competent to serve a summons or by registered mail.[102]

Thus, under this statute, service on the Commissioner was permissive, not mandatory. And it was this permissive language that the *Powell* court relied upon to hold that the Commissioner was not the exclusive agent to receive service on behalf of Sphere Drake.[103]

Here, unlike Sphere Drake, AXIS is an ***authorized*** foreign insurer. And, therefore, RCW 48.05.200 governs service:

> Each authorized foreign or alien insurer must appoint the

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[102] RCW 48.05.215 (1999) (emphasis added). The Legislature subsequently amended the requirements for serving an unauthorized foreign insurer. *See* LAWS OF 2011, ch. 47, § 6.

[103] *Powell*, 97 Wn. App. at 900. The *Powell* court also stated that alien insurers can always be served under the state's long-arm statute. *Id.* This statement is not essential to the court's holding and, accordingly, it constitutes mere dicta. And the only authority cited by the *Powell* court to support this assertion is *Kiblen*, which, for the reasons discussed above, is flawed and unpersuasive.

> commissioner as its attorney to receive service of, and ***upon whom must be served, all legal process*** issued against it in this state upon causes of action arising in this state. Service upon the commissioner as attorney constitutes service upon the insurer. ***Service of legal process against the insurer can be had only by service upon the commissioner***, except actions upon contractor bonds . . . .[104]

Accordingly, unlike the permissive service statute at issue in *Powell*, the service statute in this case mandates that the Commissioner—and only the Commissioner—can accept service on behalf of AXIS.

V. CONCLUSION

When read and reasonably interpreted, the relevant service statutes—RCW 4.28.080(7)(a), RCW 48.05.200, and RCW 48.02.200—establish that, with the sole exception of actions involving contractor bonds, the Commissioner is the exclusive agent to accept service on behalf of authorized foreign insurers. These statutes work well together and do not conflict with Washington's extra-territorial service provisions or its long-arm statute. This Court has previously held that the Legislature possesses the authority to designate certain public officials to accept service, and the most recent Legislative amendments to the applicable service statutes have only clarified the

[104] RCW 48.05.200(1) (emphasis added).

Commissioner's unique and exclusive authority to accept service on behalf of authorized foreign insurers.

The Court, therefore, should answer "yes," to the District Court's certified question, and hold that Ohio Security's failure to comply with the statutory requirements mandating service upon the Commissioner rendered its service on AXIS ineffective.

DATED: August 23, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2017, I electronically filled the foregoing with the Clerk of the Court using the Web Portal system which will send notification of such filing to the person(s) listed below,

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I declare under penalty of perjury under the laws of the state of Washington on August 23, 2017, at Seattle, Washington.

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4837-1924-9741.1

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